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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

PETER SIMONELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED

I. Is a sentence based upon a District Court's estimated tax loss, under the Federal Sentencing Guidelines, which estimated tax loss is not submitted to or found by the jury, a violation of the Fifth Amendment and Sixth Amendment in light of *Apprendi* v. *Jersey*?

II. Is an upward departure in the amount of a $500,000 fine, imposed allegedly to insure recovery of the loss, without any bases or reason a violation of both the Federal Sentencing Guidelines and the Fifth and Sixth Amendments?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and has been designated for publication but is not yet reported. (App. 1a-28a).

The opinion of the United States District Court appears at Appendix C&D to the petition and is unpublished. (App. 43a-53a).

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 19, 2001.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of or indictment of a Grand Jury ***; nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides, in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations, ***

STATEMENT OF THE CASE

Indictment

The indictment prepared and obtained by the government charged the Petitioner, Peter Simonelli, with a Conspiracy to File False Tax Returns (18 U.S.C. § 371) in Count 1; Filing of a False 1991 Tax Return (26 U.S.C. § 7206(1)) in Count 2; and Filing a False 1992 Tax Return (26

U.S.C. § 7206(1)) in Count 3. Aiding and Abetting (26 U.S.C. § 7206(2)) was alleged in Count 4. **None of the Counts alleged a specific tax loss.** Appendix B (App. 29a-42a).

Charge To Jury

At trial, the jury was **specifically** charged:

1. Regarding the False Tax Return Claim that:

> . . . this government does not have to prove that there was a tax due and owing for the years in issue, and whether the government has or has not suffered a monetary loss as a result of the alleged return is not an element of the crimes charged in those counts.

(App. 44a).

2. Regarding the Conspiracy that:

> The government is not required to prove that Peter Simonelli personally committed or knew about the overt act. . . . The government does not have to prove that the Conspiracy succeeded or was achieved.

(App. 44a-45a).

No specific loss was proven nor was any specific loss found or addressed by the jury. The

specific jury verdict did not encompass that element.

3. Sentencing Hearing & Imposition of February 18, 2000:

At Sentencing the trial court used a "preponderance of the evidence" standard. (App. 47a). The Court enhanced the Petitioner for uncharged perjury two levels. *id.* (App. 47a).

The court proceeded to go outside the indictment and jury finding again respecting the uncharged loss. Based on tax loss computations that the government provided to the court only on the day of sentencing (JA 1490-91) (App. 47a-51a), including new figures that were never evaluated by the probation department (JA 1490-91), *id.* Appendix D (App. 46a-53a), the court fixed an estimated tax loss number at $457,586, (JA 1507-08). It also rejected the defense's contention that most of those items had to be aliocated between the Petitioner and his brother. (JA 1507-08) *id.* Appendix D (App. 46a-53a). This tax loss figure increased the charged level 6 offense and a 2 level enhancement for complicated scheme resulted in an offense level 15, with a sentencing range of 27-33 and a fine range of $5,000 to $50,000. See U.S.S.G. §§ 2T4.1 and 5E1.2(c). The Court imposed a 30 month term, and granting the government's request for an upward departure of the fine to a fine of $500,000. (JA 1526) (App. 51a-53a).

REASONS FOR GRANTING THE PETITION

The Writ Should be Granted Because:

a. The Court of Appeals affirmed a Sentence and Fine based entirely on an **estimated** uncharged tax loss never submitted to or found by the jury;

b. It is in direct conflict with this court's decision's in *Jones* v. *United States*, 526 U.S. 227 (1999) and *Apprendi* v. *New Jersey*;

c. The Circuit Courts are in a state of confusion, mockery and conflict concerning the application of the Fifth and Sixth Amendments to the Federal Sentencing Guidelines.

The First Circuit Court of Appeals held:

> The estimated tax loss to the government was $457,586. He was sentenced to 30 months in prison, a term which he is now serving, and fined half a million dollars.

(App. 2a).

It concluded:

> There is no *Apprendi* issue because, at least, his sentence was within the statutory maximum of five years under 18 U.S.C. § 371 and three years per offense for his 26 U.S.C. § 7206(1) and § 7206(2) violations.

(App. 27a).

Yet under the Federal Sentencing Guidelines for the offense charged in the indictment and found by the jury, the range of imprisonment is a level 6, 0-6 months incarceration (U.S.S.G. § 2T4.1.)

Petitioner argues that under the Fifth and Sixth Amendments, it is required that the heightened sentence based on an estimated increased tax loss had to be charged in the indictment and proven beyond a reasonable doubt to the jury. There is no dispute that neither occurred. By a preponderance of the evidence standard, the District Court increased Petitioner's charged level 6 to a level 17, based upon an estimated tax loss of $457,586 and imposed a fine of half million dollars. Petitioner urges that this enhancement and fine directly conflicts the holdings of this court in *Jones* v. *United States* and *Apprendi* v. *New Jersey.*

In *Jones*, this court viewed as unconstitutional a penalty enhanced by findings determined by a Judge where it was not charged in the indictment. *Jones*, 526 U.S. at 243, n.6 i.e. "any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Further, the *Jones* concurring opinions stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *id.* In *Apprendi* this court viewed *Jones* as having foreshadowed it's ruling; it further quoted *Jones* that "[s]uch facts must be established by proof beyond a reasonable doubt." *id.*

The amount of the alleged tax loss is the sole major factual determination that dictated the length of this sentence in this case and others similarly situated. Under the Constitutional jurisprudence of *Jones* and *Apprendi* it is an element that must be charged in the indictment and an issue that must be submitted to the jury, under a reasonable doubt standard.

In *Apprendi*, this court expressly endorsed the rule set forth in the concurring opinion in *Jones* that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi* at 120 S.Ct. (2000) quoting *Jones* "Such facts must be established by proof beyond a reasonable doubt." *id.* In imposing a 30 month enhanced sentence upon the Petitioner and a $500,000 fine based directly and solely on this uncharged loss determined to be **estimated** by a Judge under a preponderance of evidence standard, the District Court violated the Constitutional provisions guaranteed to protect the Petitioner under the Fifth and Sixth Amendments. The entire issue of loss was never submitted nor determined by the jury. Indeed, it is the practice of some District Courts to expressly admonish the jury, as here, that they are not to concern themselves with the amount, if any, of loss — that issue is for the Court. The jury is merely to decide if the entries of income on the tax return are in fact accurate.

The Petitioner was sentenced under the Federal Sentencing Guidelines, U.S.S.G. § 2T4.1. This Guideline sets specific sentencing ranges, to which the court is bound. Those ranges are

expressly dependent upon the amount of loss attributable to the tax loss for which the defendant was convicted. The Petitioner urges that under the rule of law established by this Court in *Apprendi*, absent a finding by the jury of the amount of loss he is liable for, the District Court is required to impose a term of incarceration within the range provided for by the guidelines for the base offense. The District Court here, unconstitutionally increased the Petitioner's base offense level under the applicable guidelines from a level 6 to a level 17, a 400% increase. This type of sentence finding and fixing based on uncharged and unfound jury determination truly amounts to a "tail which wags the dog of the substantive offense." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986).

Conflict in the Lower Courts: A Mockery

The lower Courts continue to be in severe conflict over the issue of whether this Court intended *Apprendi* to apply uniformly to all sentencing proceedings, including those under the Federal Sentencing Guidelines. The widespread uncertainty over the Courts permissibility to continue to sentence by a preponderance of evidence standard in guideline cases necessitates further direction from this Court, at this time. A compilation of this conflict, in many cases intra Circuit, is demonstrated in Appendix E (App. 54a-73a), *A Charting of Conflicting Circuit Court Apprendi Decisions*. This chart reveals certain aspects which must be addressed by this Court. There is a clear conflict between these lower courts that hold the

traditional view of uniform protection of the Fifth and Sixth Amendments to the present determinate sentencing system under the Federal Sentencing Guidelines and those courts which adhere to a narrow nullification of *Apprendi* view.

This group states that this Supreme Court intended Fifth and Sixth Amendment protection **only** if the sentence exceeds a maximum sentence set forth in statute, regardless if the statutory provision were preempted, as here, by the Federal Sentencing Reform Act of 1984. This conflict has escalated in spite of the near fifty *Apprendi* decisions of this Court listed on p. 70-73 of Appendix E. Though the tempo and direction of these decisions would appear supportive of a traditional view, they are far from being of a precedential or instructive nature.

The more astute lower court Judges have urged an approach of viewing *Apprendi* through the lens of the Justices of this Court:

> "Viewed through the lens of the separate opinions of Justices Scalia, Thomas, 0'Connor, and Breyer, case *infra* at 19-20, *Apprendi's* implications for legitimacy of a variety of sentencing schemes, inclusively of the United States Sentencing Guidelines have stirred enormous controversy . . . ." *United States* v. *Mack*, 229 F.3d 226 (3rd Cir. 2000). See conflicting view within the same Circuit in Appendix E; also see *United States* v. *Norris*, No. 97 CR. 705-011 D.C. E.D.N.Y. Feb. 1, 2001, urging

> that the guidelines are not **guides** but mandatory and that Courts that refuse to give Constitutional protections take an improperly narrow view and should not deprive jury determinations engage in "watering down" Constitutional rights otherwise applicable. This Court declared narrow view Courts statement of the guidelines merely being a channel . . . seems to this Court more an **ingries fatuus** than a serious agreement. Yet see conflicting decisions within the Second Circuit in Appendix E.

Then there are the Circuits that have declared outright war on *Apprendi.* See the 4th, 5th, and 11th Circuit hostile reaction in Appendix E. Some Circuits, even after having received cases back from this Court on remand have refused to recognize the more traditional view and have turned their backs in arrogance to this Court. See *United States* v. *Smith*, 99-4253 (7th Cir. 2/08/01) and *United States* v. *Jackson*, 2001 21355 (7th Cir. 1/10/01) and cf. *United States* v. *Garcia*, 99-51091 (5th Cir. 2/15/01) and *United States* v. *Ramirez*, 98-6130 (6th Cir. 2/16/01.) To the contrary, some lower courts on remand have respectfully modified the sentence in accord with *Apprendi* announcing it's intended stringent traditional view of constitutional compliance in the future, see *United States* v. *Jones*, 97-1377 (10th Cir. 2000).

The present status of conflict is a mockery to this United States Supreme Court and has

greatly deteriorated the respect for the supremacy and leadership of this High Court. A clear expression of a unified application of the Fifth and Sixth Amendments protections being applicable to the Federal Sentencing Guidelines is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER SIMONELLI, Pro Se

APPENDIX

APPENDIX A

United States Court of Appeals
for the First Circuit

No. 00-1326

UNITED STATES OF AMERICA,
Appellee,

v.

PETER SIMONELLI,
Defendant, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
and Lynch, Circuit Judge.

Alan M. Dershowitz, with whom Victoria B. Eiger and Dershowitz, Eiger & Adelson, P.C., were on brief, for appellant.

Michael E. Karam, Attorney, United States Department of Justice, with whom Paula M. Junghans, Acting Assistant Attorney General,

Donald K. Stern, United States Attorney, Robert E. Lindsay and Alan Hechtkopf, Attorneys, United States Department of Justice, were on brief, for appellee.

January 19, 2001

LYNCH, Circuit Judge. Peter Simonelli, a successful business man, was convicted by a jury of filing false federal income tax returns for the years 1991 and 1992, of aiding and abetting the filing of false tax returns for his company, Eastford Tool and Die Co., Inc., and of conspiracy. See 26 U.S.C. § 7206(1). The estimated tax loss to the government was $457,586. He was sentenced to 30 months in prison, a term which he is now serving, and fined half a million dollars. His appeal results in our resolving for the first time several issues under the Federal Rules of Evidence.

I.

The prosecution theory was that Simonelli actually had income in excess of a million and a half dollars over the two years, but reported income for himself of only $84,245 and $141,701 respectively in those two years. The corporation reported ordinary income of $7,925 and $92,783 respectively for those years. The government presented evidence that during this period, Simonelli spent considerable sums on the acquisition and renovation of an expensive home, the Wells estate, and had other expenses well

beyond his reported income. His company purchased a ski chalet and a health and racquet club, as well as interests in a country club, for the benefit of Simonelli and his family. These advances were not reported either as personal income to Simonelli or as a loan to him. In addition, the company made payments to Simonelli's parents on Simonelli's personal debt to them for a buyout of their interest in the company. Much of this was made possible, the government contends, because Simonelli diverted company funds to personal use by falsely claiming the expenditures as corporate expenses. The company's income (and pass through to shareholders, as this was a subchapter S corporation) was falsely reduced by the company's two accountants through a set of improperly adjusted journal entries and the falsification of two accounts payable. As a result, Simonelli understated his income and his tax liability, as well as that of the company.

The defense theory was that Simonelli relied on the advice of his accountants as to his taxes. As to why the accountants would have an incentive to prepare false books and tax returns for an innocent client, the defense theory was that the accountant, Baker, was himself in bad financial straits, needed the income from his work for Simonelli, and wanted to keep his client happy. The jury convicted.

Simonelli now says that both the conviction and the sentence are in error. The conviction must be set aside, he says, because of three

errors in admission of evidence, errors which cumulatively, at least, were not harmless. He also says the district court erred by failing to instruct the jury with respect to accomplice testimony. Finally, he says that even if he was rightfully convicted, the sentence was in error because of a miscalculation of the base offense level and an improper upward departure on the amount of the loss. The appeal requires resolution of questions about the limits of admissibility of evidence under Rules 608, 106, and 801, Fed. R. Evid., and common law doctrines concerning prior consistent statements. We decide a question previously undecided by this circuit about the reach of Rule 801, Fed. R. Evid., when prior consistent statements are offered not for their truth but to buttress the credibility of a witness previously impeached with prior inconsistent statements.

II.

1. Claimed Evidentiary Errors

Simonelli, on appeal as at trial, portrays this case as one which turned on whether the jury believed Simonelli's story that he was a busy man who left tax matters to his accountants, or believed the accountant Baker's testimony that Simonelli instructed him to hide the use of company monies and to make false entries, intending to cheat the government on taxes. In that credibility contest, Simonelli argues, there were three evidentiary errors which had the effect of improperly bolstering Baker and improperly

portraying Simonelli as a bad man, who, among his other sins, treated his own father poorly.

A. Cross Examination of Defendant on Other Acts: Rule 608

Simonelli's business, Eastport, was a tool and die company. Its largest customer was Pratt & Whitney, with at least 75 percent of Eastport's business coming from that company.

Simonelli was cross-examined about his relationship with Pratt & Whitney in ways that called into play the strictures of Rule 608, Fed. R. Evid. That rule "is centrally concerned with character for veracity, a mode of accrediting or discrediting the witness that is based on the same 'propensity' reasoning of Rule 404 [which prohibits prior bad acts evidence] but is subject to quite different rules. Rule 608 permits accrediting or discrediting by opinion or reputation evidence as to character for veracity, Rule 608(a), and, on cross-examination only, by inquiry into specific instances of conduct 'if probative of truthfulness or untruthfulness.'" United States v. Cudlitz, 72 F.3d 992, 996 (1st Cir. 1996) (quoting Fed. R. Evid. 608(a)).

On cross-examination of Simonelli, the government was permitted to ask Simonelli a series of questions about Pratt & Whitney over the Rule 608 and 403 objections of defense counsel. Simonelli said he understood there was a policy prohibiting gratuities which would prevent the giving of a gift to a buyer at Pratt & Whitney who would be in a position to place orders for the

company. The prosecutor was permitted, under Rule 608, to ask:

> [I]sn't it a fact that your contract with Pratt & Whitney was canceled because Pratt & Whitney determined that you had violated [their] gratuity policy.

Simonelli admitted this was so. Later, on questioning from his own counsel, Simonelli explained that he had given a pool table as a wedding present (as well as some lumber) to a friend who worked for Pratt & Whitney. Simonelli testified that he received no business in return and that the friend was not in a position to place orders. He also testified that he had fully cooperated with Pratt & Whitney's investigation and had been assured that his company would not be cut off from business with Pratt & Whitney, and so he was shocked when that happened. He attributed Pratt & Whitney's actions to pressure from the IRS.

Later questions followed, including whether Pratt & Whitney had audited Eastern on a large contract and had found Simonelli and his minions altering time cards, all of which Simonelli denied. Simonelli's counsel then asked for an instruction that the questions were not evidence, to which the court replied that it would so "instruct the jury appropriately at the time." Simonelli then was asked about another contract and whether he had ever made up fictitious labor hours to get more money from Pratt & Whitney than was due for the time actually spent on performing the contract. He denied that. He was

also asked whether he (and one of Baker's partners) had removed records from Eastern and then told the Pratt & Whitney investigator the documents were unavailable because there had been a fire. Simonelli denied this.

Simonelli now challenges all of these questions on the basis that the mere violation of a company gratuity policy is not evidence probative of untruthfulness, admissible in the discretion of the court under Rule 608, and that the questions were so prejudicial they should have been excluded under Rule 403. The government makes the unhelpful response that it is permitted to ask leading questions on cross-examination, and the more helpful response that violation of a gratuity policy is like bribery, and that bribery evidence has, in most circuits, been deemed admissible under Rule 608. This court has not yet decided whether bribery is a crime going to untruthfulness for Rule 608 purposes.

At issue in this case is admissibility under the second sentence of Rule 608(b), where a principal witness's truthfulness is being attacked by asking the witness about specific instances of conduct. See id. (specific instances of conduct "may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . .").[1] The trial court is required under the rule to balance the probative value of specific instance

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[1] 1. There was no effort by the government to introduce extrinsic evidence after Simonelli denied each instance.

evidence against the potential dangers and costs of the evidence as recognized in Rules 403 and 611. See Fed. R. Evid. 608 (advisory committee's note); 28 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6118, at 94 (1993). Since the defense never asserted that the government did not have a good faith basis to ask the questions, the question of whether such basis exists is not an issue. Cf. United States v. Grajales-Montoya, 117 F.3d 356, 362 (8th Cir.) (prosecutors must have good faith basis for questions asked during cross-examination of a defendant), cert. denied, 522 U.S. 1007 (1997).

The cross-examination questions at issue are not fungible, and must be analyzed individually. The questions about altering time cards, inflating bills, and stealing away with records, all of which Simonelli denied, were about prior bad acts that tended to show untruthfulness. That Simonelli denied these acts does not, of course, render the questioning harmless. There is a lingering odor left by such questions, and so we continue the analysis.

We conclude the inquiry was proper. The discretion of the district court under Rule 608 is guided by several factors, including whether the instances of prior untruthfulness bore some similarity to the conduct at issue, whether or not they were remote in time, whether they were cumulative of other evidence, and whether there was some likelihood they happened. See United States v. Mateos-Sanchez, 864 F.2d 232, 236 (1st Cir. 1988) (questions about specific instances of

conduct must be "clearly probative of truthfulness" and not remote in time); see also United States v. Sutherland, 656 F.2d 1181, 1198 (5th Cir. 1981) (merely cumulative evidence not admissible under Rule 608). Applying these factors here, there was no abuse of discretion in admitting the evidence under Rule 608. See United States v. Bartelho, 129 F.3d 663, 675 (1st Cir. 1997) (applying abuse of discretion standard), cert. denied, 525 U.S. 905 (1998); Tigges v. Cataldo, 611 F.2d 936, 938 (1st Cir. 1979) (same). There is no basis to distrust the trial judge's Rule 403 determination.

Nor was there an abuse of discretion in the trial judge's decision not to interrupt the flow of the cross-examination to instruct the jury that the questions were not more than questions. The trial court gave such an instruction at both the start of the trial and at the close of the evidence. This is largely a judgment call by the trial judge and we see no reason to disturb that judgment. See United States v. Palmer, 203 F.3d 55, 59 (1st Cir.) (district court has "considerable leeway" as to timing of curative instruction), cert denied, 120 S. Ct. 2756 (2000).

A different issue is posed by the first question, which was about violation of the company's gratuity policy. Here, we agree that admission of this evidence was error. We ground our conclusion on the facts that there was no showing to the court of the content of the anti-gratuity policy or whether the alleged violation bespoke of untruthfulness and otherwise met the

tests for weighing discretion under Rule 608 outlined above. As the defense has ably argued, there are anti-gratuity policies and then there are anti-gratuity policies. It may violate an anti-gratuity policy to give a holiday tip to a doorman, or to give a gift to a friend who happened to work for an important business contractor, but whose job would not permit the friend to send work in the direction of the giver. There are too many factual variations possible to say that a violation of a gratuity policy by itself qualifies as an instance of untruthfulness under Rule 608.

Taken alone, the error amounted to little, because Simonelli testified about the circumstances of the gift of the pool table and lumber and that it had no effect on his business, so it could not have been the equivalent of a bribe. The error, thus, was hardly strong evidence of lack of truthfulness. We consider later the cumulative effect of the alleged errors.

B. Testimony of Simonelli's Father for the Prosecution

As evidence in support of its theory that Simonelli had the company pay his personal debts and then did not report the payment as income or a loan to himself, the prosecution presented testimony from Simonelli's father, Henry. The evidence was relevant.

Henry had retired in 1986 from the company and he and his wife were owed sums for their ownership interest. Simonelli owed his parents approximately $990,000, a new

automobile, and insurance under a 1988 written buyout agreement, reached when Simonelli failed to honor his first agreement with his parents. Henry testified that he received some payments from Simonelli and that his understanding was that Simonelli was not supposed to be reimbursed by the company for the payments. Checks were introduced showing payments from the company to Simonelli at the same time (or before) and in the same amounts as the payments Simonelli made to Henry, thus tending to establish that exactly such reimbursements were made. Henry also testified that he understood the agreement to mean that Simonelli could not sell or otherwise dispose of collateral of the company other than in the ordinary course of business. He said that his son had bought real property using company funds without first discussing it with Henry or receiving Henry's permission.

On cross-examination, Henry was shown not to recall many details and the defense theme was developed that the sum Simonelli and his brother owed to their parents came down to the lesser amount of $148,000 and that Simonelli had offered to pay that amount.

On appeal, Simonelli says that he was placed in an impossible situation, a family tragedy of Shakespearean proportions.[2] He could

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[2] Simonelli refers to King Lear, Act I, Scene 4, 311-312, where Lear speaks about Goneril, the daughter whom he thinks has not honored an agreement:

> How sharper than a serpent's tooth it is to have a thankless child.

not, he says, effectively cross-examine his own father. Despite these appellate protestations, there was an effective cross-examination, which showed the father to be confused about some dates and particulars.[3] Simonelli's second argument is that Henry's testimony was simply wrong in the particulars. That was for the jury. The third argument is that on redirect, Henry revealed that he lived in a mobile home and had been financially embarrassed when his car had been twice repossessed, at the times Simonelli stopped making the payments owed under the 1988 agreement and earlier. This, Simonelli argues, was irrelevant and an attempt to bias the jury by painting him as "an ungrateful and heartless son" in contrast to "an abused and sympathetic father who was . . . responsible for the company's, and thus his son's, financial success."

On redirect the prosecution picked up the defense's theme about the sums still owed, establishing that the payments had stopped at least two years prior and that Henry was still owed those sums. To buttress that point, the

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Shakespeare provides the response, later in that play:

> To willful men,
> The injuries that they themselves procure
> Must be their schoolmaster

King Lear, Act II, Scene 4, 305.

[3] It is a legislative policy judgment whether to curtail the authority of prosecutors to question family members and Simonelli has offered nothing to suggest the legislature intended to limit such examination.

prosecutor established that Henry lived in a mobile home and twice had had his car repossessed. Although objection was made to some of this evidence, there was no abuse of the trial court's discretion under Rule 403 in admitting the testimony, much less was plain error committed as to the evidence to which the defense did not object. While not the most attractive examination by the government, it was the defense that had played the theme that only smaller sums were owed and that Simonelli had offered to pay them, which may have suggested there was little impact on the father. The government countered that theme, and we cannot say there was an abuse of discretion in admitting the evidence.

C. Prior Consistent Statements of the Accountant: Rule 801

Simonelli complains about the prosecution's use of Baker's grand jury testimony to bolster Baker's credibility on redirect by showing that Baker made statements to the grand jury consistent with his trial testimony, after Baker on cross-examination had been shown to have made some statements to the grand jury inconsistent with his trial testimony. Baker also admitted on cross that he had lied in some testimony to the grand jury. Simonelli says that this situation is governed by Rule 801(d), Fed. R. Evid.,[4] and the evidence must be excluded

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[4] Rule 801(d) provides in relevant part:

(d) Statements which are not hearsay. A statement is not hearsay if--

because it did not comply with the conditions of the rule.[5] The government responds that the evidence is admissible under Rule 106, Fed. R. Evid., the rule of completeness. Neither of them is entirely right.

We set the context. Baker's testimony on direct supported the government's case, and is largely described elsewhere in this opinion. On cross-examination it was established that Baker had committed perjury several times, first in his initial testimony to the grand jury in 1995. For example, Baker had told the grand jury that he understood certain tax returns, which were never submitted to the IRS and which showed a much higher personal income for Simonelli, were for internal company use only. The testimony was false because Baker knew the returns were going to be submitted to Merrill Lynch in support of Simonelli's effort to get financing to purchase some property. At the time of this grand jury testimony Baker and Simonelli had the same

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> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

Fed. R. Evid. 801(d)(1)(B)

[5] There has been extensive commentary on the issue and the inconsistencies within the Rule, which we will not repeat. See generally M. Graham, Federal Practice and Procedure: Evidence § 7012; C. Mueller & L. Kirkpatrick, 4 Federal Evidence § 406 (2d ed. 1994).

counsel and Baker came to think that situation created a conflict for the lawyer.

Baker then retained new counsel and reached an agreement to cooperate with the government; the agreement required him to tell the truth. Baker was debriefed by the government and again said that Simonelli did not tell him how the unusual tax return would be used, but that he had a feeling Simonelli would use it to try to obtain some property. Cross-examination at trial showed that Baker had been untruthful during this proffer.

Baker received an immunity order. He also testified at trial that he lied in the second grand jury appearance when he said that only in retrospect did he realize something was illegal when in fact he knew it was illegal at the time. He testified that he lied because at the time he was afraid, but that he had come to understand that he had no reason to lie and so did not lie in his testimony on direct at trial.

On redirect the government responded with evidence, admitted over some objections, that Baker had made a number of statements to the grand jury which were consistent with his trial testimony. Baker was then permitted to read testimony he had given to the grand jury and to say that it was consistent with his trial testimony. Some of that evidence went beyond the specific points covered on cross-examination about the grand jury testimony, but generally was within the scope of the overall cross-examination. The trial judge did not permit the grand jury

transcript to be introduced and later instructed the jury that it could consider the inconsistencies only as they related to the topic of whether a witness was to be believed.

Here, the witness was doubly impeached: he was impeached by the disparity between certain trial and grand jury testimony and impeached by his admission that he lied before the grand jury and to the prosecutors. The defense showed that Baker lied to the prosecutor when he was under an explicit obligation to tell the truth and that Baker lied to the grand jury, even though it was not in his interest to do so because he had been given immunity. This suggested that at trial, where Baker also testified under immunity, he might still be lying. The purpose of some of the rehabilitation by prior consistent statements was not to show there was really no inconsistency but to show that Baker did not lie about everything and that most of what else he had to say at trial was consistent with what he had said earlier to the grand jury.

The issue of when prior consistent statements can be used to rehabilitate a witness, rather than as substantive evidence, has its complications. Before the Supreme Court decision in Tome v. United States, 513 U.S. 150 (1995), most but not all circuits had held that although prior consistent statements could not be used for the truth of the statement if the conditions in Rule 801(d) were not met, the Rule did not displace the common law rule that prior consistent statements could be introduced in

certain situations to rehabilitate a witness. Usually, this situation occurred when the other consistent statements came from the same document or transcript and pertained to the same supposedly inconsistent statement. The policies behind Rule 106, the rule of completeness, were used, in part, to justify admissibility. See, e.g., United States v. Millan, 230 F.3d 431, 434 (1st Cir. 2000) (rule of completeness permits party to introduce rest of fragmentary statement used against it in order to place excerpt in context). This court had early on said that "out-of-court statements are often admissible for non-hearsay purposes and . . . a district court has considerable leeway in applying Rule 403." United States v. Mazza, 792 F.2d 1210, 1215 (1st Cir. 1986), cert denied 479 U.S. 1086 (1987).

In Tome, the Court addressed a different issue: whether "out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose are admissible under the Rule." 513 U.S. at 152 (emphasis added). Noting that the text of Rule 801 provides that statements meeting the Rule's requirements are not hearsay and thus may be used substantively, the Court held that the Rule embodies the common law requirement that the statement must have been made before there was a motive to fabricate. In Tome, it appears that the government was attempting, after hesitant and uncertain testimony by a child of sexual abuse and a cross of the child to the effect that she had a reason to fabricate, to prove its substantive case through a parade of other

witnesses who would testify that the child had told them earlier about the abuse. Tome does not govern here for two reasons: the statements here were not offered for their truth and the question of post-motive to fabricate "consistent statements" is simply not presented here.

Since Tome, this court has adverted to but not decided the issue of whether prior consistent statements may be admissible, when the conditions of Rule 801 are not met, if they are not offered for their truth but only as to credibility following impeachment through prior inconsistent statements. See United States v. Lozada-Rivera, 177 F.3d 98, 103 (1st Cir. 1999) ("It is a matter of some debate whether Rule 801(d)(1)(B) controls prior consistent statements of all stripes or whether a more relaxed test applies when a prior statement is offered for a rehabilitative purpose."). One reason for caution is that the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors. See Tome, 513 U.S. at 171 (Breyer, J., dissenting).

With this context, we come back to our problem. We now join the majority view, well expressed by the Fourth Circuit in United States v. Ellis, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 106 (1998), that "where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, . . . Rule 801(d)(1)(B) and its concomitant restrictions do not apply." Id. at 919. When the

prior statements are offered for credibility, the question is not governed by Rule 801.

That Rule 801 does not preclude admissibility does not establish that there is a basis for admissibility. Whether there is a basis for admissibility is determined by the interplay between the rule of completeness and the common law doctrine about prior consistent statements. Both evidentiary doctrines serve a common interest: prior statements are admissible which tend to show the statement is not really inconsistent when it is understood in its proper context. See 4 Wigmore on Evidence § 1126, at 259-62 (Chadborn rev. 1972) (criticizing broader rules of admissibility of prior consistent statements and commending narrower rule which allows evidence of prior statements to help jury determine if there really was a contradiction). This is also the approach taken by the Fifth Circuit in United States v. Holland, 526 F.2d 284 (5th Cir. 1976), allowing the government to use a statement made in "the same [grand jury] proceeding to correct an earlier misstatement" in the grand jury testimony which had been used to impeach the witness. Id. at 285. Prior consistent statements still must meet at least the standard of having "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." United States v. Pierre, 781 F.2d 329, 331 (2d Cir. 1986). Other circuits have also recognized admissibility when the prior statements serve to clarify whether the impeaching statements really were inconsistent.

See, e.g., United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985). That purpose is more in accord with the rule of completeness, and statements for that purpose are admissible. See Tome, 513 U.S. at 172-73 (Breyer, J., dissenting).

Here neither the rule of completeness nor the common law doctrine of admissibility of prior consistent statements justified the admission of all of the evidence. We reject the government's argument that all of its use of prior consistent grand jury testimony is encompassed by the rule of completeness. This court rejected the same broad argument from the government in United States v. Awon, 135 F.3d 96 (1st Cir. 1998), decided before the trial in this case.[6] We held the rule of completeness applied only where the introduction of limited pieces of information created unfairness or potential for misimpression. See id. at 101. In Awon, we held:

> The doctrine of completeness does not permit the admission of otherwise inadmissible evidence simply because one party has referred to a portion of such evidence, or because a few

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[6] In Awon two government witnesses on cross-examination testified that each first made statements implicating defendant after the witness himself had been targeted by the police and then agreed to cooperate. Thus, cross-examination established a motive to fabricate. The government sought to rehabilitate the witnesses by introducing earlier statements made to police. Those statements were admitted and then the defense highlighted the inconsistencies between the trial testimony and those statements. The government argued on appeal that the rest of the statements were admissible under the doctrine of completeness because the written statements bolstered the in-court testimony.

> inconsistencies between out-of-court and in-court statements are revealed through cross-examination; rather, it operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full text of the out-of-court statement.

Id.

We do not suggest that the rule of completeness has no bearing here, only that it does not apply to all of the evidence at issue. In fact, there was some evidence which was admissible under the rule of completeness. For example, Baker testified that when he was presented with the larger context of his seemingly inconsistent statement to the grand jury about the tax returns given to Merrill Lynch, he fully admitted to the grand jury that he was part of the fraud as to the Merrill Lynch returns. But it is also true that the government's use of grand jury testimony went beyond the specific inconsistencies in the grand jury testimony addressed on cross. It said it could do so because there has been a general attack on Baker's credibility.

We see little basis for admissibility of the questioning about Baker's grand jury testimony that went beyond the setting of context, explanation, and completeness for the answers he gave on cross about his inconsistent answers to the grand jury. There is no rule admitting all prior consistent statements simply to bolster the

credibility of a witness who has been impeached by particulars. See Tome, 513 U.S. at 157 ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited."). There was certainly some discretion in the trial judge, as the boundaries for what is needed for completeness may be unclear. But beyond that, the introduction of prior grand jury statements on redirect was not really for rehabilitation. The government was just presenting again the testimony it presented on direct, this time through the testimony about statements to the grand jury.

For much the same reason, though, the error in admitting some prior statements, standing alone, is harmless. The evidence was cumulative and the line between what was useful for completeness and what went beyond is a judgment call. At most the evidence was an extra helping of what the jury had heard before. Sometimes, of course, that extra helping can be so prejudicial as to warrant a new trial. Not here. There was strong evidence of guilt and some improper repetition of testimony through what a witness said to a grand jury, in a generalized effort to bolster the witness, mattered little.

2. Jury Instruction

Simonelli says that the district court erred in not giving his proposed accomplice instruction to the jury. Baker was the accomplice.

Here the district court gave the jury an instruction on immunized witnesses:

> You've heard the testimony of Gary Baker and Jeff Crabtree, each of whom has testified under a grant of immunity issued by a court. What this means is that the testimony of those individuals may not be used against them in any subsequent criminal proceeding. However, if either of them testified untruthfully, that individual could be prosecuted for perjury or making a false statement, even though he was testifying under a grant of immunity.
>
> Some people in this position are entirely truthful when testifying. Still, the testimony of a witness who provides evidence against a defendant for immunity from prosecution must always be scrutinized and weighed with particular caution and care. That witness may have had a reason to make up stories or exaggerate what others did because he wanted to help himself. You must determine whether the testimony of such a witness has been affected by any interest in the outcome of this case, any prejudice against the defendant, or by any of the benefits he has received from the government as a

> result of being immunized from prosecution.

The court rejected the defense request for an accomplice instruction on the ground that it duplicated the immunized witness instruction.

In United States v. Newton, 891 F.2d 944 (1st Cir. 1989), this court held that there was no error in not giving a specific accomplice instruction where an immunized witness instruction was given because the two were functionally equivalent: "In both instances, the jury is instructed that the testimony must be received with caution and weighed with care. Consequently, whether we treat the government witnesses as accomplices or as persons granted immunity, or both, is immaterial, because the instruction would be the same." Id. at 950.

Simonelli tries to distinguish Newton on the grounds that the immunized witness instruction also conveys that the witnesses have particular incentive to be truthful and so that instruction does not adequately capture the concept that accomplices have incentives not to be truthful. That is true. But the instruction given was an accurate reflection of the evidence at trial, where the accomplices were immunized. The district court was correct to decline to give an additional accomplice instruction.

3. Harmless error

The errors we are left with are the one question and answer about violation of the Pratt

& Whitney anti-gratuity policy and excessive use of prior consistent statements from grand jury testimony. These are non-constitutional errors and analyzed under the harmless error test. See United States v. Rose, 104 F.3d 1408, 1414 (1st Cir.), cert. denied, 520 U.S. 1258 (1997).

We find the errors, cumulatively, are harmless for a number of reasons. The case was not, as Simonelli describes it, entirely a contest for the jury to pick whom it believed: Simonelli or the accountant Baker. Independent of Baker's testimony, there was strong evidence that Simonelli had committed tax fraud. There were the expenditures of considerable sums of money for his personal benefit: homes, country clubs, cars and other accoutrements of wealth, with little of the sums to pay for these things reported to tax authorities as his income or as a loan to him. Further, to the extent such items were expensed on the corporate returns, a jury could easily conclude that these were not legitimate business expenses for the company but were really income to Simonelli. Then there was the contrast: when it was in Simonelli's interest to report higher income in order to obtain financing from Merrill Lynch and from Mercedes-Benz Credit Corporation, he provided information on loan applications and what purported to be his tax returns showing his income to be in the hundreds of thousands of dollars. This contrasted with the paltry income he reported to the IRS. From the fact that Simonelli was willing to mislead those two companies by purporting to show them "his" tax returns, but not the returns

he actually filed with the IRS, the jury could conclude he was willing to mislead the IRS as well. From the fact that Simonelli took some steps, primitive though they were, to hide his use of corporate monies, such as the payments of his obligations to his parents, the jury could infer an intent to commit fraud. Further, Debbie Graves, who worked as a bookkeeper at the company, testified that Simonelli maintained close scrutiny over his business and was not always forthcoming as to the purpose for specific checks, once barking at her to "[n]ever mind what the damn check is for. Just write it out when I tell you to." From that testimony, the jury could reject Simonelli's defense that he was an innocent in the hands of a corrupt accountant and, indeed, believe the falsity of his explanation was further evidence of his guilt. The sheer amount of unreported income involved -- more than $1 million for 1991 and $600,000 for 1992 -- also made his defense less than credible.

Baker's testimony was also strong: in addition to the particulars of any number of events, he said that he warned Simonelli that some transactions amounted to tax fraud and that Simonelli told him to do them anyway. Baker testified that Simonelli repeatedly instructed him that he did not want to pay taxes and that the best place to "hide the money" was in the firm's material expense category and so, for example, payments for a Vermont chalet for Simonelli were there hidden. Baker had little incentive to perpetrate a massive tax fraud in the name of an

unsuspecting client. He received no benefit from the fraud other than his normal accounting fee.

There is no rational basis to conclude that the errors would have had any effect on the jury verdict at all. We affirm the conviction.

4. Sentencing Issues

Simonelli claims there were several errors in sentencing. First, the amount of the tax liability, $457,000, he says is wrong and was a dramatic increase from the $349,027 figure the Probation Department originally calculated, and that Probation only corrected the figure a few days before sentencing, and so notice of the increased sum was inadequate. Simonelli says that the later, larger figure improperly includes sums attributable to the defendant's brother. Second, he argues that the jury was required to decide the amount of tax liability under Apprendi v. New Jersey, 530 U.S. 466 (2000). The final claimed error is that the court erred in imposing a fine of $500,000 without adequately explaining its decision.

These arguments are without merit. There is no Apprendi issue because, at the least, his sentence was within the statutory maximum of five years under 18 U.S.C. § 371 and three years per offense for his 26 U.S.C. § 7206(1) and § 7206(2) violations. As for the inadequate notice argument, it was not raised in the trial court and defendant knew of the higher figure days before the sentencing hearing. The higher figure was a correction of a mistake and the rules do not

prevent corrections of mistakes. Simonelli has shown no prejudice. Whether the brother's ownership interest was a straw for Simonelli or genuine, it was related relevant conduct and could be counted. See U.S.S.G. § 1B1.3.

Finally, the guidelines provide for an upward departure in the amount of a fine on conditions and for reasons stated in U.S.S.G. § 5E1.2(c), app. note 4. The district court expressly based its upward departure on that guideline, thus adequately explaining the reason for the increase.

The conviction and sentence are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No. 98-
	)	Violations
	)	18 U.S.C. §371 -- Conspiracy;
v.	)	26 U.S.C. §7206(1) -- Filing False Tax Returns
	)	26 U.S.C. §7206(2) -- Aiding and Abetting the Filing of a False Tax Return
PETER SIMONELLI, Defendant.	)	

INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this Indictment:

1. The defendant, PETER SIMONELLI, was the president and a shareholder of Eastford Tool and Die Company, Inc., (hereinafter referred to as "ETD") located at Woodstock Valley, Connecticut.

2. ETD is a tool and die machine shop which specializes in manufacturing tools used in the production of aircraft ground support equipment.

3. Precision Products Division (hereinafter referred to as "PPD"), sometimes referred to as Carbide Products Division "CPD," is a division of ETD.

4. "Simonelli Properties" is owned and controlled by the defendant, PETER SIMONELLI.

5. The defendant PETER SIMONELLI maintained sole signatory authority over the "Simonelli Properties" checking [**JA 45**] account at Connecticut National Bank, now known as Fleet Bank.

6. Eastford Tool and Die Partnership (hereinafter referred to as "ETDP") is an entity owned and operated by the defendant PETER SIMONELLI and his brother Salvatore Simonelli.

7. The defendant PETER SIMONELLI and Salvatore Simonelli, through ETDP, own the real estate upon which the ETD and PPD factories are located.

8. ETDP administers the receipt of rent and the payment of the mortgages secured by the real estate upon which the ETD and PPD factories are located.

9. Sims Health and Racquetball Club is located in Charlton, Massachusetts and is owned by the defendant PETER SIMONELLI and his brother Salvatore Simonelli.

10. Ballymeade Country Club is a private Golf Club and real estate development located in Falmouth, Massachusetts.

The Grand Jury further charges that:

Count 1: (18 U.S.C. §371 Conspiracy)

11. On or about January 1, 1991, and continuing to and including October 20, 1993, both dates being approximate and inclusive, within the Judicial District of Massachusetts, the defendant,

PETER SIMONELLI,

together with others both known and unknown to the Grand Jury, [**JA 46**] did knowingly and willfully conspire to: (a) defraud the United States by impeding, impairing, obstructing and defeating the lawful government function of the Treasury Department and the Internal Revenue Service, an agency of the United States, in the ascertainment, computation, assessment and collection of revenue: to wit, federal income taxes; (b) knowingly file false Individual U.S. Income Tax returns, Form 1040 in the name of PETER SIMONELLI for calendar years 1991 and 1992 in violation of Title 26 U.S.C. §7206(1); and knowingly file false U.S. Income Tax Returns for an S Corporation, Form 1120S, in the name of Eastford Tool & Die Co., Inc. for the calendar years 1991 and 1992 in violation of Title 26, U.S.C. §7206(l).

MANNER AND MEANS OF THE CONSPIRACY

12. As a part of the conspiracy and in order to further its objectives, the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, concealed as

"rent expense" and "materials expense" approximately $1,000,000 in ETD funds that the defendant utilized for his personal benefit.

13. It was further part of the conspiracy that the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, concealed as "materials expense" approximately $350,000 in ETD moneys that the defendant used to invest in the purchase of the Ballymeade Country Club located in Falmouth, Massachusetts.

14. It was further part of the conspiracy that the [**JA 47**] defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, in an attempt to reduce or eliminate ETD's taxable income, thereby reducing the defendant's personal income tax liability, caused and otherwise directed personnel at his accounting firm to knowingly prepare false financial statements for ETD.

15. It was further part of the conspiracy that the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, caused and otherwise directed materially false Corporate U.S. Income Tax Returns, Form 1120S, for ETD for calendar years 1991 and 1992 to be prepared and filed with the Internal Revenue Service.

16. It was further part of the conspiracy that the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, caused and otherwise directed materially false Individual U.S. Income Tax Returns, Form

1040, for the defendant and for Salvatore Simonelli for calendar years 1991 and 1992 to be prepared and filed with the Internal Revenue Service.

OVERT ACTS

In furtherance of the conspiracy, the defendant committed, or caused to be committed, among others, the following overt acts:

17. On or about January 3, 1991, and continuing to December 31, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed approximately $570,773 in ETD checks to be [**JA 48**] issued and made payable to Simonelli Properties, his brother Salvatore Simonelli, and himself.

18. On or about January 31, 1991, and continuing to October 30, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed approximately $127,120 in ETD checks issued to Simonelli Properties, his brother Salvatore Simonelli, and himself to be classified on the books and records of ETD as "rent."

19. On or about November 7, 1991, and continuing to December 12, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed approximately $134,167 in ETD checks made payable to ETDP to be classified on the books and records of ETD as "rent."

20. On or about February 20, 1992, and continuing to October 9, 1992, the defendant, PETER SIMONELLI, caused and otherwise

directed approximately $107,257 in ETD checks to be issued and made payable to himself and Simonelli Properties.

21. On or about August 9, 1991, the defendant PETER SIMONELLI entered into a contract for the purchase of residential real estate located at Eastford Road, Southbridge, Massachusetts, (hereinafter referred to as the "Wells Estate") for $540,000.

22. On or about May 31, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed ETD to issue check number 18396 in the amount of $23,750 to Simonelli Properties, which check was deposited into the Simonelli Properties checking account at Connecticut National Bank. [**JA 49**]

23. On or about May 31, 1991, the defendant, PETER SIMONELLI, presented to Prudential Horne-Hastings Realtors, as payment toward the purchase of the Wells Estate, check number 2159 in the amount of $23,750 drawn on the Simonelli properties checking account at Connecticut National Bank.

24. On or about June 5, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed ETD to issue check number 18417 in the amount of $31,250, to Simonelli Properties, which check was deposited into the Simonelli Properties checking account at Connecticut National Bank.

25. On or about June 5, 1991, the defendant, PETER SIMONELLI, presented to

Prudential Horne-Hastings Realtors, as payment toward the purchase of the Wells Estate, Simonelli Properties' check number 2177 in the amount of $31,250 drawn on the Simonelli Properties checking account at Connecticut National Bank.

26. On or about July 21, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed 1988, 1989, and 1990 Individual U.S. Income Tax Returns for 1988, 1989, and 1990 to be prepared in his name and submitted to Merrill Lynch Equity Management Co., Inc. which were substantially different from the 1988, 1989, and 1990 Individual U.S. Income tax Returns he had filed with the Internal Revenue Service.

27. On or about August 15, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed ETD to issue check number 18775 in the amount of $28,020,96 to Simonelli Properties, [**JA50**] which check was deposited into the Simonelli Properties checking account at Connecticut National Bank.

28. On or about August 15, 1991, the defendant, PETER SIMONELLI, caused and otherwise directed ETD to issue check number 18776 in the amount of $100,000 to Simonelli Properties, which check was deposited into the Simonelli Properties checking account at Connecticut National Bank.

29. On or about August 16, 1991, the defendant, PETER SIMONELLI, presented to Mountain Dearborn Whiting, to close the

transaction for the purchase of the Wells Estate, check number 2238 in the amount of $130,000 drawn on the Simonelli Properties checking account at Connecticut National Bank.

30. On or about August 26, 1992, the defendant, PETER SIMONELLI, caused and otherwise directed ETD check number 20007 in the amount of $100,000 to be deposited to an account under his direction and control at Savers Cooperative Bank.

31. On or about August 26, 1992, the defendant, PETER SIMONELLI, caused and otherwise directed ETD check number 20008 in the amount of $100,000 to be deposited to an account under his direction and control at Southbridge Credit Union.

32. On or about August 26, 1992, the defendant, PETER SIMONELLI, caused and otherwise directed ETD check number 20009 in the amount of $100,000 to be deposited to an account under his direction and control at Fleet Bank.

33. On or about October 30, 1992, the defendant, PETER SIMONELLI, caused and otherwise directed ETD check number 18544 [**JA 51**] in the amount of $50,000 to be deposited to an account under his direction and control at Southbridge Savings Bank.

34. On or about December 3, 1992, in connection with the purchase of the Ballymeade Country Club, the defendant, PETER SIMONELLI, caused and otherwise directed check number 103

in the amount of $95,000, drawn on an account under his direction and control at Savers Cooperative Bank, to be used to purchase cashiers check 43434, said check made payable to John T. Callahan & Sons, Inc.

35. On or about December 3, 1992, in connection with the purchase of the Ballymeade Country Club, the defendant, PETER SIMONELLI, caused and otherwise directed check number 107 in the amount of $50,000, drawn on an account under his direction and control at Southbridge Credit Union, to be issued and made payable to John T. Callahan & Sons, Inc.

36. On or about December 3, 1992, in connection with the purchase of the Ballymeade Country Club, the defendant, PETER SIMONELLI, caused and otherwise directed cashiers check number 67557 in the amount of $40,000, drawn on an account under his direction and control at Southbridge Savings Bank, to be issued and made payable to John T. Callahan & Sons, Inc.

37. On or about December 4, 1992, in connection with the purchase of the Ballymeade Country Club, the defendant, PETER SIMONELLI, caused and otherwise directed cashiers check number 1705263 in the amount of $95,000, drawn on an account under his direction and control at Fleet Bank, to be issued and made [**JA 52**] payable to John T. Callahan & Sons, Inc.

38. On or about September 9, 1992, the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, caused and otherwise directed personnel at ETD

to increase accounts payable on ETD's 1991 books and records by approximately $215,875.

39. On or about September 9, 1992, the defendant, PETER SIMONELLI, together with others known and unknown to the Grand Jury, caused and otherwise directed personnel at his accounting firm to increase ETD's 1991 "materials expense" by approximately $749,678.

40. On or about February 6, 1992, the defendant, PETER SIMONELLI, caused and otherwise directed $1,500 in ETD funds to be paid to Double D Electrical Contractors for work performed at the defendant's personal residence.

41. In or about April 1992 through June 1992, the defendant, PETER SIMONELLI, caused and otherwise directed approximately $2,260 in ETD funds to be paid to Edward Brosseau for work performed at the defendant's personal residence.

42. From in or about January through June 1992 the defendant, PETER SIMONELLI, caused and otherwise directed approximately $4,537 in ETD funds to be paid to Todd Ethier for work performed by Mr. Ethier for the defendant's personal benefit.

43. From in or about January through June 1992, the defendant, PETER SIMONELLI, caused and otherwise directed [**JA 53**] approximately $6,285 in ETD funds to be paid to James and Bill Madelle for work performed at the defendant's personal residence.

44. From in or about January through June 1992, the defendant, PETER SIMONELLI, caused and otherwise directed approximately $11,095 in ETD funds to be paid to Robert Tolson for work performed at the defendant's personal residence and at the defendant's health club.

All in violation of Title 18, United States Code, Section 371.

The grand jury further charges:

Count 2: (26 U.S.C. §7206(1) - Filing a Materially False U.S. Income Tax Return)

That on or about September 9, 1992 in the District of Massachusetts,

PETER SIMONELLI,

the defendant herein, a resident of Southbridge, Massachusetts, did willfully make and subscribe to a 1991 U.S. Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which tax return he did not believe to be true and correct as to every material matter in that on line 23 of said 1991 tax return a total income of $84,245 was reported, whereas, as he then and there well knew and believed, his total income for 1991 substantially exceeded this amount. [**JA 54**]

All in violation of Title 26, United States Code, Section 7206(1).

The grand jury further charges:

Count 3: (26 U.S.C. §7206(1) - Filing a Materially False U.S. Income Tax Return)

That on or about October 20, 1993 in the Judicial District of Massachusetts,

PETER SIMONELLI,

the defendant herein, a resident of Southbridge, Massachusetts, did willfully make and subscribe to a 1992 U.S. Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which tax return he did not believe to be true and correct as to every material matter in that on line 23 of said 1992 tax return a total income of $141,701 was reported, whereas, as he then and there well knew and believed, his total income for 1992 substantially exceeded this amount.

All in violation of Title 26, United States Code, Section 7206(1). [**JA 55**]

The grand jury further charges:

Count 4: (26 U.S.C. §7206(2) - Aiding and Abetting the Filing of a Materially False U.S. Income Tax Return)

That on or about August 21, 1992 in the Judicial District of Massachusetts,

PETER SIMONELLI,

the defendant herein, a resident of Southbridge, Massachusetts, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Income Tax Return for an S Corporation, Form 1120S, for Eastford Tool & Die Co., Inc., for the calendar year 1991, which was false and fraudulent as to a material matter in that line 21 of said 1991 tax return reported $7,925 in ordinary income from trade or business activities, whereas, as he then and there well knew and believed, net income from trade or business activities for Eastford Tool & Die., Inc. for 1991 substantially exceeded this amount.

In violation of Title 26, United States Code, Section 7206(2). [**JA 56**]

The grand jury further charges:

Count 5: (26 U.S.C. §7206(2) - Aiding and Abetting the Filing of a Materially False U.S. Income Tax Return)

That on or about September 13, 1993, in the Judicial District of Massachusetts,

PETER SIMONELLI,

the defendant herein, a resident of Southbridge, Massachusetts, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Income Tax Return for an S Corporation, Form 1120S, for Eastford Tool & Die Co., Inc., for the calendar year 1992, which was false and fraudulent as to a material matter in that line 21

of said 1992 tax return reported $92,783 in ordinary income from trade or business activities, whereas, as he then and there well knew and believed, net income from trade or business activities for Eastford Tool & Die., Inc. for 1992 substantially exceeded this amount.

All in violation of Title 26, United States Code, Section 7206(2). [**JA 57**]

A TRUE BILL.

Dated:_____ _____
FOREPERSON

DONALD K. STERN
UNITED STATES ATTORNEY

By: _____
COREY J. SMITH
Senior Trial Attorney
Department of Justice
Tax Division [**JA 58**]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	) CR 98-30030
	) Boston, MA
v.	) August 12, 1999
	)
PETER SIMONELLI	)

BEFORE THE HONORABLE
NATHANIEL M. GORTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(As previously noted.)

JUDITH A. TWOMEY, RPR
Official Court Reporter
One Courthouse Way
Courtroom 10-Room 5200
Boston, MA 02210
(617) 946-2577

[**145**] caused to be made with an intent to deceive.

My previous instructions with respect to the definition of willful apply to counts 4 and, 5 as well, including my instructions relating to good faith, reliance on professional advice, and willful blindness.

With respect to counts 4 and 5, the government does not have to prove that there was a tax due and owing for the years in issue, and whether the government has or has not suffered a monetary loss as a result of the alleged return is not an element of the crimes charged in those counts.

Now I'm going to go back to count 1.

Count 1 charges Peter Simonelli with conspiring to defraud the United States and conspiring to commit federal crimes, specifically, the crimes of filing a false individual income tax return in violation of title 26 of the United States Code, 7206(1), and filing a false corporate income tax return in violation of title 26 of the United States Code, section 7206(2).

It is against federal law to conspire with someone to defraud the United States and to commit those crimes.

Section 371 of Title 18 of the United States Code provides in part that if two or more persons conspire to commit any offense against the United States [**149**]

An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy.

The government is not required to prove that Peter Simonelli personally committed or knew about the overt act. It is sufficient if one conspirator committed one of the overt acts

alleged in the indictment which you will have with you in the jury room at sometime during the period of the conspiracy. You must, however, unanimously agree on which specific overt act was committed. The overt act may, but for the alleged illegal agreement, appear to be totally innocent and legal.

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy was complete upon the agreement to commit the underlying crime and the commission of one overt act.

Now part 3. When you go to the jury room to begin considering the evidence, the forewoman, Ms. Sanstet (sic), will assure that every juror is present during all of your deliberations and that all jurors, the forewoman included, will have an equal and full opportunity to participate in the deliberations.

Once you are in the jury room, if you need to communicate with me, the forewoman will send a written,

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)
	)
vs.	)CR No. 98-30030
	)
PETER SIMONELLI	)

BEFORE: The Honorable Nathaniel M. Gorton

DISPOSITION

United States District Court
Courtroom No. 2
595 Main Street
Worcester, MA 01608
Friday, February 18, 2000
2:53 P.M.

Cheryl Dahlstrom
Official Court Reporter
United States District Court
595 Main Street, Room 514
Worcester, MA 01608-2076
Mechanical Steno - Transcript by Computer

[**41**] I am strongly inclined to agree with the government on this one. I believe the jury weighed the evidence in this case, and I am convinced that the jury believed Mr. Baker, did not believe Mr. Simonelli, on the crucial issue of the conversation about whether or not the proposed conduct was illegal.

There is no way for me, at least under the standard that I'm going to apply, that is, preponderance of the evidence, to believe that this defendant did not lie on the witness stand. He did. The jury said that he did, in my opinion, by virtue of the verdict it rendered. Even if it didn't, based upon what I saw at the trial and my evaluation of the credibility of the witnesses, albeit that Mr. Baker had his own problems and was testifying under an order of immunity, as do many witnesses in criminal trials, I believe his testimony to be correct and that Mr. Simonelli, in fact, perjured himself on the witness stand and that, therefore, a two-level increase is warranted for obstruction of justice.

I'll hear Mr. Prince in response to that.

MR. PRINCE: Your Honor, in regard to Mr. Simonelli's testimony and Mr. Baker's testimony, Mr. Simonelli testified to what he recalled. Mr. Baker testified to what he recalled. But let's put it in context now. It was Gary Baker who came to the courtroom with a history of perjury. It was Gary Baker who lied under oath before the first grand jury [**47**] said the government -- he told -- Sal told the government that he never reviewed the tax returns of Eastford Tool & Die or Eastford Tool & Die Partnership. He would just sign them.

Sal also stated that he left it up to the accountants to handle the job properly, as they were paid to do. Sal was advised that the records indicated that there were some deliberate miscalculations, and Sal stated he had no knowledge of that activity.

Now, when Sal said that, they believed it. When Peter says it, you don't believe him. And this is the brother, the 50 percent shareholder, the co-partner of the same company. That's an inconsistency. Gary Baker lied and some day the truth will be known. But there it is. They believed Sal, who says the same doggone thing.

THE COURT: All right. I've heard sufficient on that particular issue. On the basis of Sentencing Guideline 3C1.1, obstruction of justice, I find that the defendant in this case committed perjury on the stand and that, therefore, should be awarded a two-level increase of his base offense level. And I'm going to do that.

I will now turn to the offense level computation, which, if counsel wishes to follow, is recommended to me starting on Page 8 of the Presentence Report. I have previously found under the Guideline 2 -- the appropriate guideline to be applied in a rather circuitous method is the [**48**] guideline that was in effect as of November 1, 1992, which -- and I am referred to Guideline 2T1.9(a)(1), which is the section referring to conspiracy to impair, impede or defeat tax.

That guideline directs that the base offense level be determined from 2T1.3, which, when you turn to that guideline, Subsection (a)(1) provides

that the base offense level is derived from the amount of tax revenue lost by the government and as reflected in the corresponding tax table at 2T4.1. All of which gets us to 2T4.1. And by virtue of my previous rulings, under the tax table, Subsection (j) is that which applies because the tax loss has been deemed to be more than 350,000 and less than $500,000. Therefore, the offense level is found to be 15.

I have declined to accept the recommendation of the Probation Office to add a two-level increase for abuse of a position of trust on the first conspiracy count. Therefore, as to that count, the adjusted offense level is found to be 15.

With respect to Counts 2 and 3, filing false tax returns, going through the same procedure, I come to a base offense level of 15. I decline to follow the recommendation of Probation to apply a two-level increase for the use of sophisticated means, and I decline to follow the recommendation to add two levels for abuse of a position of [**49**] trust. Therefore, I come out with an adjusted offense level of 15.

With respect to Counts 4 and 5, aiding and abetting the filing of false tax returns, I find the same base offense level, using the same guidelines as before, at 15. I decline to accept the recommendation of Probation to add two levels for sophisticated means. I decline to add the two levels recommended that the offense was committed as part of a pattern or scheme from which the defendant derived a substantial portion of his income. And I decline to add two levels for

an abuse of trust. However, with respect to this count, I do add two levels for an obstruction of justice, as previously determined. Therefore, the adjusted offense level is 17.

By virtue of the multiple count adjustment under 3D1.4, I find the total offense level to be 17.

That brings us to a determination of the defendant's criminal history. I find that, with respect to a conviction in 1984 for operating under the influence of liquor, for which the defendant was found guilty, one criminal history point should be awarded. I find that for a conviction in 1988 of operating after revocation of a license, for which he was found guilty in 1989, an additional criminal history point is awarded; that, therefore, the defendant has two criminal history points and falls in Criminal History Category II. I [**50**] note other criminal conduct which was not scored but was reported to me in the Presentence Report.

It is appropriate I believe at this stage to consider the defendant's supplemental motion for downward departure with respect to criminal history. I will hear Mr. Prince now in that regard.

MR. PUCCI: Your Honor, if I may.

THE COURT: Yes, Mr. Pucci.

MR. PUCCI: Yes. Thank you, your Honor. We provided a memorandum on this point, your Honor, defendant's memorandum

THE COURT: Yes.

MR. PUCCI: And obviously, as the Court referenced earlier, it has reviewed it. I agree that the Court has isolated the two events that are in issue on the criminal history, and we have no dispute that they're accurately reported in the presentence investigation.

The Court will note that there is no description of the events themselves. There's nothing suggesting they were particularly egregious in any way other than the fact that they're convictions. Both of them are more than a decade old. In fact, if the Court scans the additional criminal history, which is not scoring, it will note that there's nothing within a decade among those offenses for which charges were made but convictions did not occur.

[**81**] that you just made that went on for some time did you recognize that or address that issue. The fact that you've made charitable donations is commendable, but that doesn't excuse your criminal conduct, for which you were convicted and for which this Court is now going to sentence you to a sentence of imprisonment and a very substantial fine.

I hope that during this time that you are incarcerated you will think about the laws that you have violated and recognize them. You are obviously a very talented businessman. That has never been in question in this court. What has been in question is indeed your integrity, your morality, your ability to obey the law. You have

not done that. In fact, you have violated it. For that, you are going to jail.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that you, Peter Simonelli, are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 months. This term consists of terms of 30 months on each of the five counts, all to be served concurrently.

It is further ordered that you shall pay to the United States a fine of $500,000, consisting of the following: A fine on Count 1, 2, 3, 4, and 5 of $100,000 on each count, totaling $500,000. The fine shall be paid immediately or prior to the completion of the first 60 days of [**82**] supervision. And it is to be continued to be paid until the full amount, including any interest required by law, has been paid. You shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of this fine remains unpaid.

While on supervised release, which will be for a term of three years, you will -- shall not commit another federal, state or local crime.

In addition, you shall comply with the standard conditions that are described in the sentencing guidelines at Section 5D1.3(c) and with the following special conditions: First, you are prohibited from possessing a firearm or other dangerous weapon.

Second, you are to pay the balance of the fine within 60 days of the commencement of supervised release.

Third, you are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer unless you are in compliance with the payment schedule.

Fourth, you are to provide the Probation Officer access to any requested financial information. Fifth, you are to participate in a mental health program as directed by the United States Probation Office.

And, finally, you are to meet with the Internal

APPENDIX E

CHARTING OF CONFLICTING CIRCUIT COURT APPRENDI DECISIONS

The following is a compilation of known conflicting interpretations of the United States Supreme Court decision in Apprendi v. New Jersey, 120 U.S. 2348, 147 L.Ed. 2d. 435 (June 26, 2000). For brevity, the following symbols of classification are used:

T.V. – Traditional view of uniform protection of Fifth and Sixth Amendments to the present determinate sentencing system, i.e. the Federal Sentencing Guidelines.

N.V. – Narrow nullification view. Application of Fifth and Sixth Amendments only if sentence exceeds maximum sentence set forth in any statute, regardless if the statute was pre or post Federal Sentencing Reform Act of 1984. Apparently contra Mistretta v. United States, 488 U.S. 361 (1989) (abolishing statutory indeterminate scheme, and preemption by guidelines, except as preserved in U.S.S.G. 5.1.1 contra Edwards v. United States, 523 U.S. at 511 (1998).

P.V. -- The procedural nullification view which applies the gymnastics of procedural maze to bar the Fifth and Sixth Amendment rights.

FIRST CIRCUIT

Sustache-Rivera v. U.S., 221 F.3d 8 (1st Cir. 2000) (Judge Lynch). P.V. coined phrase

"procedural maze" p.12, not retroactive and harmless error; guidelines not addressed, carjacking enhancement.

U.S. v. Roy, No. 00-71-P-H (D.Me. 10/4/00) (Judge Hornby).

U.S. v. Mojica-Baez No. 98-2349 ___ F.3d. ___, 2000 WL 121013 (1st Cir. 8/30/00) P.V. Failure to submit element of use of semiautomatic weapon to jury and use for enhancement was harmless error; contra, Third, Fourth, Ninth & Tenth Circuits.

U.S. Baltas, 2001 WL 1001, 14 (1st Cir. 1/2/01) (99-1547). N.V.

U.S. v. Lafreniere, 2001 WL 1002, 8 (1st Cir. 1/2/01) (99-1318). N.V. "regardless that drug quantity was never determined by jury beyond a reasonable doubt" where sentence within statutory maximum.

Norton v. U.S. No. Civ. A 00-12198-WGY, ___ F.Supp.2d. ____, 200 WL 11612294 (D. Mass. Oct. 2000). P.V. rejected second motion under Section 2255, no jurisdiction; also Apprendi held not to apply to prior conviction enhancement.

SECOND CIRCUIT

U.S. v. Fitzgerald, 2000 W.L. 1707494 (2nd Cir. 11/15/00) on remand 2000 WL 1880328 (S.D.N.Y. 12/28/00). T.V. "in accordance with my oral order***" release defendant "forthwith from the custody of Bureau of Prisons and/or United States Marshalls."

U.S. v. Maslin, 2000 W.L. 1294254 (N..D. N.Y. 9/14/00) (Judge McAvoy). T.V.; in absence of specific amount of drugs in indictment must presume less.

U.S. v. Kee 2000 U.S. Dist., Lexis 8785 (5 D.N.Y. 6/27/00). N.V. suggest notice by Bill of Particulars; capital sentencing.

Parisi v. U.S., 3:95 Cr. 00135 PCD, ___ F. Supp. 2d. 2000 WL 1611999 (D. Conn. Oct. 25, 2000). T.V. – granted 2255 motion re 841 sentence while sentence was within permitted range, the enhancement above the range authorized by the guidelines was a statute under which he was not indicted. Guideline range already factored in his criminal history. Court made a finding of fact greater than sentence authorized by the jury verdict. Implicitly assumed Apprendi to be retroactive.

Robinson v. U.S., 00 Civ. 7493 LAK, 2000 WL 1585686 (S.D. N.Y. Oct. 25, 2000). T.V. – ordered appointment of attorney since possible meritorious Apprendi claim in that charge to jury failed to require jury finding as to the amount of drugs.

U.S. v. Nachamie, 2000 WL 1372863 (S.D. N.Y. 9/22/00). N.V. preponderance sufficient to justify enhancement offense level for fraud on amount of unlimited loss under guidelines; Apprendi limited to increase beyond statutory maximum.

U.S. v. Moreno, 2000 WL 1843232 (S.D. N.Y. 12/14/00). T.V. vacated life sentence imposed since amount of drugs not in indictment and jury

instructed amount of drugs not an element; thus can only sentence to most lenient statutory maximum; but not precluded to run consecutively ("stacking").

THIRD CIRCUIT

U.S. v. Cepero, 224 F.3d 256, 268 n.5 (3rd Cir. 2000). N.V.; in short footnote.

U.S. v. Mack, 229 F.3d 226 (3rd Cir. 2000) Judge Garwood; concurring opinion of Chief judge scholarly T.V.; must view through lens of Supreme Court Justices; concurring opinion of Chief Judge Becker, scholarly T.V. in viewing Fifth and Sixth Amendment application to guidelines through lens of Justices of U.S. Supreme Court and thus guideline enhancements that increase maximum guideline sentence with increasing statutory maximum may run afoul of Apprendi; majority states Apprendi excludes prior convictions at issue.

U.S. v. McCulligan, No. 99-401-01 (E.D. Pa. 11/3/00) (Judge Ludwig)

U.S. v. Powell, 109 F. Supp. 2d. 381 (E.D. Pa. 2000) (Judge Robreno) N.V.; sentencing enhancements under armed career Crim. Ct. is not an element; expressly excluded in Apprendi – Justice Thomas statement does not undermine Almendarez-Torres.

Williams v. U.S., Civ. A. 99-2756, 2000 WL 1342541 (E.D. Pa. 9/18/00) – stated Apprendi claim "arguably runs from the date of the

Supreme Court decision", but rejected claim on basis Apprendi excludes prior convictions.

Doe v. United States, 112 F.Supp.2d 398 (D.N.J. 2000) permitted amendment beyond one year limitation of Section 2255, implicitly finding Apprendi claim newly recognized claim made retroactive by Supreme Court but rejected on Merits since sentence did not exceed statutory maximum for which petitioner was charged and pleaded guilty, i.e. 5 kilograms of cocaine.

FOURTH CIRCUIT

U.S. v. Kinter, No. 99-4621. N.V. Apprendi does not apply to guidelines since they are not "statutory" maximum although a "colorable argument that Sentencing Guidelines do provide that maximum" but notes those ranges in statute by 18 U.S.C. 3553(b); loss enhancement; bribery case.

U.S. v. Lewis, 00-4016 (4th Cir. Dec. 19, 2000). N.V. Tax loss enhancement under guidelines found by preponderance not under Apprendi since it its "limited to facts that increase punishment beyond prescribed statute maximum citing Mesbach.

U.S. v. Angle, No. 96-4662 (4th Cir. 10/12/00) (Judge Michael). N.V.; where amount of drugs not charged in indictment judge may determine by preponderance unless guideline application exceeds statutory maximum; Section 841(b)(1)(c) 20 year maximum case – amount not an element unless exceeds maximum of 20 years.

U.S. v. Barritt, No. 00-6520 (4th Cir. 11/1/00) (unpublished) per curium no mention of Apprendi issue raised by Appellant. Avoidance by not addressing approach typical of unpublished opinions.

U.S. v. Henderson, 105 F.Supp. 2nd 523 (S.D.W. Va. 2000) (Judge Goodwin). T.V.; applied to guidelines and requires amount drugs be charged in indictment and submitted to jury; thus could not enhance sentence.

U.S. v. Moore, 99-4627 (4th Cir. 9/18/00) (unpublished). N.V.; no analysis; _____ Per Curium.

U.S. v. Richardson, No. 97-4101 (4th Cir. 11/22/00) (Judge Widner).

U.S. v. Perdue, No. 00-4238 (4th Cir., 9/14/00) (unpublished). N.V.

U.S. v. Whitaker, No. 99-4791 (4th Cir. 12/18/00) (unpublished). N.V.; Apprendi, even though defendant acquitted of enhanced conduct.

Darity v. U.S., 1:00CV168, 2000 WL 1804737 and 4736 (W.D.N.C. 10/25 & 12/4/00); T.V. retroactive application on habeas review and rejected Gov.'t argument of "serious implications".

FIFTH CIRCUIT

In Re: Billy Ray Tatum, No. 00-31162 (5th Cir. 11/15/00) (Per Curium). P.V.

U.S. v. Cuevas-Andrade, No. 99-10976 (5th Cir. 10/6/00) (Judge Benavides). N.V. though increases guidelines need not be in indictment since did not exceed statutory maximum. Apprendi overrules prior precedent – drug amount is an element in indictment to enhance; but for recidivist offenders maximum is 30 years even if prior not in indictment. Apprendi does not "invalidate" Court's factual finding for the purposes of determining the applicable sentencing guidelines.

U.S. v. Keith, No. 99-50692 (5th Cir. 10/17/00) (Per Curium). N.V.; drug case need not allege enhancement in indictment if does not increase statutory maximum – 20 year mandatory minimum recidivist sentence under 841(b)(1)(A) did not exceed 30 years recidivist statutory maximum under 841(b)(1)(c).

U.S. v. Meshack, 225 F.3d 556 (5th Cir. 2000), cert. denied sub nom., Parker v. United States, 2001 U.S. 13025 (U.S. 1/8/01) (00-7246) (Judge Garza). Drug case: Gov't. concealed Apprendi required correction of sentence since amount not in indictment or submitted to jury. Court held no plain error since did not exceed 20 year maximum and sentencing guideline relevant conduct only exceeds maximum. N.V.; "limited reading' granting could precipitate increased workload reasoning. Also remanded other defendant where life exceeded statutory maximum.

U.S. v. Ramerez, No. 99-50768 (5th Cir. 7/14/00) (unpublished). Heroin case; indictment did not allege quantity; remanded in light of Apprendi whether court relied upon drugs re supervisory

release terms since that was only relief sought. No challenge to 110 month which did not exceed 20 year maximum under 841(b)(1)(6).

SIXTH CIRCUIT

U.S. v. Corrado, 227 F.3d 543 (6th Cir. 2000) (Judge Wellford). N.V.; Apprendi is not triggered and the existence of a murder conspiracy did not have to be decided by a jury under the reasonable doubt standard; jury found guilt under RICO on specific charges and defendants put on notice under indictment re forfeitures.

U.S. v. Gatewood, No. 98-5138 (6th Cir. 10/10/00) (En Banc) (Judge Martin); N.V.; prior conviction exception – "Almendarez-Torres remains the law" prior conversions not elements to be in indictment for mandatory life sentence; dissent; "The majority arrives at its Apprendi***"; "The majority attempts to avoid the obvious consequences of the Supreme Court ruling in Apprendi***".

U.S. v. Page, No. 99-5361 (6th Cir. 11/9/00) (Judge Katz).

U.S. v. Elliott, 99-5994 (6th Cir. 8/9/00) (unpublished) N.V.

U.S. Rebmann, 226 F.3d 521 (6th Cir. 2000) (Judge Merritt). T.V.; Apprendi is a "radical departure"; no waiver. Apprendi error since enhancement not in indictment or submitted to jury; guilty plea to heroin charge but at sentencing enhanced by preponderance that husband died for use of heroin.

U.S. v. Munoz, No. 1738693 (6th Cir. 11/27/00). N.V.; preponderance standard acceptable since increase did not exceed statutory maximum.

U.S. v. Garcia No. 92-20103; ___ F. Supp. 2d. ___, 2000 WL 1597757 (E.D. Mich. 10/26/00). Drug Case. T.V. In light of Apprendi gov't. attempted to amend superseding indictment to allege both drug quantity and prior convictions. Court dismissed it on basis it did not really back, rejecting that id did not broaden charges as "contrary to fundamental constitutional principals" citing Apprendi. Based decision on quantity of drugs charged, expressly declining to address whether Apprendi affects drug quantity determinations under the guidelines, or whether Apprendi applies to prior convictions.

SEVENTH CIRCUIT

Hernandez v. U.S., 226 F.3d 839 (7th Cir. 2000) (Judge Wood). P.V.; N.V.: unchanged guidelines increase approved since not beyond statutory maximum; no retroactive application of Apprendi.

Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000) (Judge Easterbrook). P.V. and N.V.; "prisoners should hold their horses and stop wasting everybody's time***".

U.S. Cavender, 228 F.3d 792, (7th Cir. 10/3/00) (Judge Wood). P.V.: not deciding if Apprendi overruled Circuit precedent that drug amounts were not elements, court found any error harmless where indictment charged "multiple kilograms of mixture containing cocaine base"

and evidence was "put before jury"; McMillan not overruled by Apprendi and controlled.

U.S. v. Smith, 223 F.3d 554 (7th Cir. 2000) Petitions for Certiorari filed (U.S. 11/14/-15/00) (00-7021; 00-7070; 00-7085) (Judge Wood) (petition filed). N.V.; life sentence based on court increase on "leadership roles" not protected; recognizing contra position of Justices Thomas and Scalia but, "in the end, however, it is our best guess that the majority would not have gone this far***"; since didn't increase statutory maximum not an element.

U.S. v. Scott, No. 99-30043, ___ F.Supp.2d, 2000 WL 1568701 (C.D. Ill. 9/27/00). P.V. – Drug Case – failure to instruct jury re finding drug amount was plain error but harmless in light of evidence at trial. Prior conviction brought sentence within guideline range thus no Apprendi violation.

EIGHTH CIRCUIT

Rodgers v. U.S., 229 F.3d 704 (8th Cir. 2000) (Per Curium). P.V.; not retroactive.

U.S. v. Carlson, 217 F.3d 986 (8th Cir. 2000). N.V. whether or not "brandished" a firearm for 7 years mandatory minimum over 5 years is not an element that must be charged in indictment. Because factor increased minimum and not maximum Apprendi not applicable, conflict with 10th Cir.

U.S. v. Russell, 00-1481, 2000 WL 1742043 (8th Cir. 11/28/00). N.V.; preponderance standard re drug quantities/obstruction did not violated

Apprendi while sentences did not exceed obstruction or perjury statutory maximum.

U.S. v. Crank, 99-2428 (8th Cir. 12/19/00).

U.S. v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000) (Judge Bowman). N.V.; preponderance as to any amount by court affirmed even though not in indictment or submitted to jury; statutory maximum not exceeded. McMillan controls/not overruled by Apprendi.

U.S. Sheppard, 219 F.3d 766 (8th Cir. 2000) (Judge Loken). T.V. – Vacated sentence in light of Apprendi where amount of drugs not in indictment or submitted to jury. P.V.: any error was harmless since indictment alleged both type and amount and "Special Finding" by jury as to drug amount provides 5th and 6th Amendment protection.

U.S. Murphy, 109 F.Supp.2d 1059 (D. Minn. 2000) (Judge Doty). T.V. – Retroactive application since a "watershed rule of criminal procedure" vacated sentence where jury instructed not required to prove amount of cocaine.

U.S. v. Nicholson, No. 99-2206 EA, et als. (8th Cir. 11/1/00). T.V.; reversed sentence on conspiracy and one count of distribution, where jury made no finding of amount. However, other preponderance under guidelines where offense level mandates life sentence; where instruction to jury left possibility jury left possibility of conviction on findings of marijuana even though indictment charged cocaine case, reversal;

Remanded for reduction of sentence not to exceed 5 years.

U.S. v. Chavez, No. 00-1404 (8th Cir. 10/20/00). N.V. Drug Case: Rejected argument that drug quantities used to determine guidelines sentence must be found by jury. Satisfied Constitutional rule since jury verdict established quantity of melhamptrelamine sufficient to trigger 841(b)(1)(A) with statutory maximum of life; Apprendi ruled "inapplicable".

U.S. v. Hopwood, 2000 WL 1770665 (D. Neb. 12/4/00). P.V. Apprendi claim time barred since U.S. Supreme Court did not state rule to be retroactive.

NINTH CIRCUIT

Jones v. Smith, No. 99-56405 (9th Cir. 11/7/00) (Judge Hall). P.V. Apprendi not retroactive.

Scott v. Baldwin, 225 F.3d 1020 (9th Cir. 2000) (Judge Lay). P.V. Apprendi not retroactive.

U.S. v. Egge, 223 F.3d 1128, 1132, N.1 (9th Cir. 2000) (C. Dicta). N.V.

U.S. v. Garcia-Guizar, No. 10435 (9th Cir. 9/20/00) (Judge Camby). T.V.; plain error in preponderance standard by court is a violation where indictment did not allege that amount of drug as an element but no affect on substantial rights of defendant where sentence below maximum. Court also assumed Apprendi prohibits increase of mandatory guideline

sentence, not implicated by Apprendi, exceeded minimum.

U.S. v. Kelly, 105 F.Supp.2d 1107 (S.D. Cal. 2000) (Judge Rhoades)

U.S. v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 9/7/00). N.V.; guideline enhancement not under Apprendi where not beyond statutory maximum.

U.S. v. Martinez, No. 99-50659 (9th Cir. 11/16/00) (Judge Berzon)

U.S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000) (Judge Canby). T.V.; "Apprendi makes clear that prescribed statutory maximum refers simply to the punishment exposed solely under the facts found by the jury"; no waiver or harmless error. Neder is not applicable.

U.S. v. Pavelcik, 2000 W.L. 1141096 (Unpublished) (Per Curium). T.V.; guideline encompassed even though below statutory telemarking penalty vacated a five year statutory sentence enhancement imposed after guilty please to mail fraud through telemarking, Section 2326; it is an element subject to being in indictment and proof beyond reasonable doubt.

U.S. v. Scheele, No. 99-30388 (9th Cir 11/2/00) (Judge Reinhardt)

U.S. v. Valenscia, No. 99-10170 (9th Cir. 8/1/00). Dismissed where guideline enhancement is disproportionate to crime charged and due process.

U.S. v. Turrisdiartes-Gonzales, No. Cr.58-GF-DWM ___ F.Supp.2d ___, 2000 WL 1346698 (D.Mont. 9/14/00) – Section 1326. Deportation case rejecting motion to strike enhancements on basis of doubt cast on Almendarez-Torres.

U.S. v. Williams, No. 99-10475, 2000 WL 1175695 (9th Cir. 8/18/00) (unpublished). Apprendi does apply to prior conviction imposition of life sentence under 3559(c).

TENTH CIRCUIT

U.S. v. Carless Jones, 97-1377 (10th Cir.12/19/00). T.V.: On Remand "Apprendi compels us to vacate Jones sentence and remand to the District Court for resentencing; 30 year drug sentence vacated and strongly suggested that an indictment that fails to indicate drug amount may be fatally jurisdictionally defective.

U.S. v. Hishaw, No. 99-6258 (10th Cir. 2000). Apprendi requires drug amount to be in indictment and applies to Section 841(b); however, cites Meshack and agrees that Apprendi "does not clearly resolve whether an enhancement which increases a sentence within statutory range but which does not increase the sentence beyond that range must be proved to the jury. Permitted sentence also on conduct outside offense of conviction based on McMillan. Here, not beyond" statutory maximum and thus no plain-error.

U.S. v. Owens, Cr.0024-L (W.D. Okla. 7/26/00) (AFPD Tony) T.V.: rejected 7 year minimum enhancement for "brandishing" a firearm, Section 924(c)(1), since it is an element which was not

given Apprendi guarantees. Conflict with 8th and 11th Circuit.

U.S. v. Wilson No. 99-6233, 2000 WL 1199101 (10th Cir. 8/23/00). I.V.: Sentence vacated for improper aggregation of drug amount by other relevant conduct and not in plea; Court also admonished that there may be an Apprendi claim that "might implicate further sentencing limitations" since no drug quantity included in indictment.

U.S. v. Heckard, 2001 WL 15582 (10th Cir. 1/9/01) (99-2186). N.V. "Judges may still ascertain drug quantities by a preponderance of evidence for the purpose of calculating offense levels under the Sentencing Guidelines so long as they do not sentence above the statutory maximum for the jury-fixed crime."

ELEVENTH CIRCUIT

In Re: Joshua, 224 F.3d 1281 (11th Cir. 2000) (Per Curium). P.V.; Apprendi not retroactive.

U.S. v. Gerrow, No. 99-12061 (11th Cir. 11/8/00) (Per Curium), N.V. – reviewed for plain error, terms within unenhanced maximum in 841(b)(1)C because of split in Circuits – majority choose view against defendants as to limitation by the cap in 18 U.S.C. 3583(b)(2).

U.S. v. Nealy, No. 99-15211 (11 Cir. 11/7/00) (Judge Edmondson). P.V. Found error since drug quantity instruction to jury was denied and objection also at sentencing but harmless error since quantity of drug not contested at trial and

testimony of defendant's admission. As to challenge that not in indictment Court refused to consider since not raised in opening brief, even though based on Apprendi.

U.S. v. Pounds, No. 99-15058 (11th Cir. 10/20/00) (Per Curium). N.V.: whether firearm was discharged, 924(c)(1)(A)(iii) is not an element because it only increases mandatory minimum and not maximum which is life. Conflicts with 8th Circuit.

U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000) (Judge Tjoflat). T.V.; applies to guidelines; analysis drug amount is an element since not submitted to jury could not exceed lower maximum of statute and guidelines.

U.S. v. Swatzie, 228 F.3d 1278 (11th Cir. 2000) (Judge Cox). N.V.; vacating would fester the public to ridicule the judicial process".

U.S. v. Walker, 228 F.3d 1276 (11th Cir. 2000). P.V. in footnote rejected any Apprendi challenge on basis since defendant pleaded guilty and accepted drug quantity in P.S.R.

U.S. v. Shepard, 00-10653 (11th Cir. 12/14/00). N.V. failure of indictment to charge drug amount, no plain error Apprendi violation where sentence not beyond statutory maximum under 841(A)(1).

D.C. CIRCUIT

In Re Green, 2000 WL 1683480 (D.C. Cir. 10/19/00)

In Re Merrick, 2000 WL 1683478 (D.C. Cir. 10/10/00)

THE UNITED STATES SUPREME COURT CASES: GRANTED CERTIORARI AND VACATED SENTENCES BASED ON APPRENDI V. NEW JERSEY

Since this current term opened on October 2, 2000, the Supreme Court has, by summary disposition, issued orders (a) granting writs of certiorari; (b) vacating the sentence; and (c) remanding back to the respective Circuit Courts of Appeal for reconsideration in light of its decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000):

OCTOBER 2, 2000

Marston E. Blue v. United States, Docket No. 99-6775 (4th Cir.)
Bernard V. Gibson v. United States, Docket No. 99-7351 (4th Cir.)
Bobby J.V. Burton v. United States, Docket No. 99-9902 (5th Cir.)
John C. Wims v. United States, Docket No. 99-8958 (11th Cir.)

OCTOBER 10, 2000

Johnny Clinton v. United States, Docket No. 00-5123 (5th Cir.)
Tony Brown v. United States, Docket No. 99-9107 (11th Cir.)

OCTOBER 16, 2000

Anthony A. Smith v. United States, Docket No. 00-5198 (7th Cir.)
Samuel J. Hester v. United States, Docket No. 99-10024 (11th Cir.)

OCTOBER 30, 2000

Harold Jackson, et al. v. United States, No. 99-10055 (7th Cir.) (Only as to some defendants)
Ricky M. Curry v. United States, Docket No. 99-0265 (11th Cir.)

NOVEMBER 6, 2000

Samuel Whitt v. United States, Docket No. 00-183 (7th Cir.)
Ruben Hughes v. United States, Docket No. 00-192 (7th Cir.)

NOVEMBER 13, 2000

Carl A. Knight v. United States, Docket No. 00-5719 (3rd Cir.)
Arindus Humphrey v. United States, Docket No. 00-5644 (6th Cir.)

NOVEMBER 27, 2000

Steven L. Twitty v. United States, Docket No. 00-5760 (4th Cir.)
Alfred E. Meais v. United States, Docket No. 5942 (4th Cir. 2000)
Charles R. Robinson v. United States, Docket No. 00-287 (7th Cir.)

Robert Clarence Potts v. United States, Docket No. 00-5930 (11th Cir.)

DECEMBER 4, 2000

Ludence A. Turnbull v. United States, Docket No. 00-345, (4th Cir.)
Iris C. Jackson v. United States, Docket No. 00-5738 (10th Cir.)

DECEMBER 11, 2000

Darrell Cadwell, Docket No. 00-6152, (8th Cir.)

JANUARY 8, 2001

Ramse Thomas v United States, Docket No. 99-9965 (11th Cir.)
Carrington, John v United States, Docket No. 99-10250 (4th Cir.)
Garcia, Edgar A. v United States, Docket No. 00-463 (11th Cir.)
Hayes, James v United States, Docket No. 00-005703 (11th Cir.)
Ardley, Barry L. v United States, Docket No. 00-6187 (11th Cir.)
McCloud, Terrance E. v United States, Docket No. 00-6289 (5th Dist. FL)
Castro, Juan B v United States, Docket No. 00-6427 (9th Cir.)
Magana, Jose G. v United States Docket No. 00-6474 (9th Cir.)

JANUARY 16, 2001

Steyskal, Daniel v United States Docket No. 00-550 (8th Cir.)

Dora, Pascal v United States Docket No. 00-5296 (11th Cir.)
Griffiths, Winston v United States Docket No. 00-6515 (11th Cir.)
Dora, Pascal v United States Docket No. 00-5296 (11th Cir.)
Cole Rawle A, et al. v United States Docket No. 00-6520 (4th Cir.)
Phillips, Warren v United States Docket No. 00-6571 (11th Cir.)